STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 28, 2006
v	No. 262286 Wayne Circuit Court
PAMELA BOOKER, Defendant-Appellant.	LC No. 04-012278-01

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals by right her jury conviction of second-degree murder, MCL 750.317. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Decedent James Lewis, Jr., was killed by a single stab to the heart on November 10, 2004 at approximately 2:00 a.m. The killing was allegedly heard but not seen by defendant's 12-year-old son, Rodney Davis, who testified at trial. The prosecutor was permitted to introduce a statement that Rodney had allegedly made to one of defendant's acquaintances approximately 18 hours after the killing. Defendant's sole claim on appeal is that the trial court erred when it allowed the admission of this earlier statement.

According to Rodney's testimony, he had known Lewis for a couple of years, and Lewis had been living in defendant's home for a couple of months, sleeping on the couch. Defendant's household also included Rodney, Rodney's sister, Sharmella, and Sharmella's friend, Erika Grady. Rodney testified that on the night Lewis was killed, he had gone to sleep around midnight, but had awakened around one o'clock in the morning. He stayed in his room playing a video game until around two o'clock, at which time Rodney heard his mother and sister talking in the hallway.[1] Rodney went into the hallway and saw the victim lying on the floor with blood on him. Rodney testified that his mother, defendant, told him that she had heard a "boom" at the

[1] Specifically, this was the hallway outside of defendant's apartment, in a building that included four single-family flats.

door, and that when she opened the door she found the victim lying there, and that defendant was crying.

Rodney testified that he called D'Juan Lilly, a family friend, who had formerly lived in the apartment above defendant's apartment. Rodney asked Lilly if he could spend the weekend at Lilly's home, and Lilly came to defendant's apartment to pick Rodney up. Rodney testified that he and Lilly went for a walk, and Lilly questioned him repeatedly about the killing. Rodney stated that the repetitive questions made him nervous, so he told Lewis that his mother had killed the victim. Lilly then called defendant.

Rodney testified that Lilly's brother, who is a police officer, later came to Lilly's home and took him to the police station to make a statement. In his statement to the police Rodney said that he heard his mother and the victim arguing, that he heard someone pull a knife from a jar in the kitchen, that he heard the victim ask defendant if she was going to stab him, and that he heard the victim scream. During the trial, Rodney did not have his glasses with him, so the court permitted the prosecutor to read some portions of Rodney's prior statement aloud, without objection by defense counsel. Defendant's son admitted that he had made this statement, and that he was telling the truth when he did so.

Lilly also testified, and it is Lilly's testimony about a statement made to him by Rodney that is challenged now on appeal. The statement was made approximately 18 hours after the killing. Lilly testified that at approximately 8:30 p.m. or 9:00 p.m. on November 10, 2004, defendant called him and asked whether her son could stay for the weekend. He agreed. She also told him that the victim had been killed. Defendant sounded nervous and was stuttering. She provided inconsistent stories of how the killing had occurred. Lilly stated that after he picked Rodney up and took him to his home, the two walked to a nearby store. During the walk, Rodney burst into tears and told Lilly that defendant had killed the victim. Rodney told Lilly that he did not want to return home, and asked to live with Lilly.

Lilly testified that, after defendant's son gave him this information, he called his brother, who is a police officer. While they waited for Lilly's brother to arrive, defendant called. During the conversation, Lilly asked defendant whether there was anything she needed to tell him. She did not reply and he asked her again, more aggressively. Lilly testified that defendant then admitted that she had killed the victim.

Other evidence was presented that substantiates this testimony. The prosecutor presented oral and written statements made by defendant in which she implicated herself in the killing. The prosecutor also presented a letter written by defendant to her boyfriend. In the letter, defendant asked her boyfriend to "talk to [her son]" and "tell him he needs to say the right things" and recant his earlier statement to the police. She wanted her son to say that he was asleep and did not hear anything, and that he had lied so that she would not put him in a juvenile home for getting kicked out of school. She further explained how her son should act during questioning so that it "don't make his self (sic) look like somebody told him what to say." The letter also described defendant's version of the events. Defendant testified and confirmed that she wrote the letter, but maintained that she was only trying to get her son to tell the truth.

II. Admission of Hearsay Testimony

Defendant argues that the trial court abused its discretion when it allowed the introduction of her son's statement to Lilly. She maintains that the testimony did not fall within the excited utterance exception because it was made approximately 18 hours after the murder. She further argues that this error was not harmless.

We review a trial court's decision to admit evidence under an abuse of discretion standard. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Decisions on close evidentiary questions will not ordinarily be considered an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

> MRE 803 provides in relevant part:
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Hearsay testimony that would otherwise be excluded is admissible under this rule under the theory that a person who is under the "'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003), quoting *Smith*, *supra* at 550; quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-819. Evidence is admissible under this exception if: "(1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event." *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). "While the time that passes between the event and the statement is important in determining whether the declarant was still under the stress of the excitement when the statement was made, the focus of the exception is on the declarant's 'lack of capacity to fabricate, not the lack of time to fabricate.'" *Id.*, quoting *Smith*, *supra* at 551.[2] It is necessary to consider whether there was a plausible explanation for the delay, such as shock. *Smith*, *supra* at 551-552. In addition, "[t]he trial court's determination whether the declarant was still under the stress of the event is given wide discretion." *Id.* at 552.

Defendant concedes that hearing a murder occur and witnessing its aftermath constitutes a startling event. The question is whether defendant's son remained under the continued stress of

[2] In *Smith*, *supra*, a mother recounted her son's description of a sexual assault that occurred ten hours prior to their conversation. The *Smith* Court held that this testimony was admissible because the circumstances tended to show that the complainant remained under a continuing level of stress that precluded the possibility of fabrication. *Smith*, *supra* at 553-554.

the event when he made his statement to Lilly. We find, given the facts and circumstances here, that the statement does not fall within the excited utterance exception to the hearsay rule.

While the passage of time is just one factor to consider, we find that the 18-hour span between the killing and the statement is beyond the reach of the excited utterance exception. We note that here Rodney was not at home alone with his mother, but could have spoken with his sister or her friend, both of whom were home, according to Rodney's testimony. We note that according to Rodney, he had a telephone conversation with Lilly during that time period. And we add that Rodney's stated reason for wanting to leave the apartment and stay with Lilly is that he was "bored." Admittedly, the witness is a twelve-year-old boy, and it is within the realm of possibility that these circumstances could add up to nothing more than shock at the killing. However, given all of these circumstances and the length of the time delay, we cannot find that the excited utterance exception applies.

IV. Harmless Error

However, we also find that the error was harmless. Under the harmless error test, "preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. An erroneous admission of hearsay evidence "can be rendered harmless error where corroborated by other competent testimony." *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Here, the critical elements of the statement to Lilly were fully corroborated by Rodney's trial testimony. He testified that he heard defendant stab the victim. In addition, his statement to the police, admitted without objection, contains more damaging information than that contained in the challenged statement. Lilly testified that defendant admitted killing decedent when she spoke to him on the phone. Defendant's letter further corroborates her involvement in the killing. Defendant essentially challenges the introduction of the least damaging evidence of her guilt. Therefore, we find no reasonable probability that, but for the admission of the admission of the challenged statement, the result of the proceeding would have been different.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper